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No. 92-673

In the Supreme Court of the United States

OCTOBER TERM, 1992

RODNEY BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the police had probable cause to arrest petitioner and thus were entitled to search his bag incident to his arrest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 955 F.2d 48 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. A petition for rehearing was denied on June 8, 1992. The petition for a writ of certiorari was filed on September 8, 1992 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted of conspiring to possess cocaine with intent to distribute it (21 U.S.C. 846), on a conditional plea of guilty entered in the United States District Court for the Central District of California. He was sentenced to 120 months' imprisonment. The court of appeals affirmed. Pet. App. 1a-3a.

1. On November 3, 1989, petitioner and two others, Reggie Lamont Toler and Tina Ruffin, were dropped off at the Los Angeles International Airport. The men were wearing telephone beepers. The only luggage the three were carrying was a black nylon bag and two shopping bags. Gov't C.A. Br. 3.

Petitioner and Toler went to a gate from which a flight to San Jose, California, was scheduled to depart. Police officers who were watching them noticed that they appeared to be very nervous. At the gate area, they appeared to be watching for observers. Ruffin stepped into the ticket counter line at the same gate. After a few minutes, Toler returned to check on Ruffin. Toler and Ruffin then paid cash for three tickets to San Jose. The fares were one-way and the flight was leaving in a few minutes. The tickets were in the names of "Mr. R. Butler, Mr. R. Butler and Ms. T. Butler." Gov't C.A Br. 3-4.

The police, who were investigating narcotics trafficking at the airport, believed that the three nearly identical names on the tickets sounded like aliases. On the basis of what they had learned, the police decided to approach and question each of the three. Gov't C.A. Br. 4.

Two officers approached Ruffin, who grew even more nervous when the police identified themselves. Ruffin at first denied knowing petitioner and Toler. When the police asked to see her ticket, however, Ruffin changed her story. She admitted that two of the tickets were for her partners, who she said were from Monterey, California. The police inquired about the three similar names on the tickets. Ruffin replied that she had purchased all the tickets in the name Butler because "the guy" told her to do it that way. By that time, Ruffin was so nervous that she was having trouble speaking. One officer stated that his job was to investigate trafficking in narcotics and large amounts of money at the airport. Ruffin spontaneously said that she had money but no narcotics. She reached into her pocket and showed the officers $15,790 in cash. Gov't C.A. Br. 4.

Officer Daniel Beers had been walking behind Toler, who in turn had been following Ruffin. When Toler saw the other police officers approach Ruffin and petitioner, he turned around. He walked away from Ruffin and unwittingly walked toward Officer Beers. Officer Beers identified himself and asked if he could speak with Toler. Before Beers could explain that Toler was not under arrest, Toler made several spontaneous statements. He stated that he was not with petitioner and Ruffin. He also claimed that he was not flying anywhere. Knowing those statements to be untrue, Beers asked Toler to sit down. Gov't C.A. Br. 5.

Drug Enforcement Administration Agent Moren then approached petitioner and identified himself. Moren told petitioner that he was not under arrest

and that he was free to leave. Moren asked if petitioner owned the black nylon bag. Petitioner replied that he did. Upon hearing that reply, Moren directed petitioner to take a seat. Officer Beers then took the bag from petitioner. Gov't C.A. Br. 5.

The officers asked petitioner once again whether the black bag or the other two bags were his. This time, petitioner did not admit owning any of the bags, and Toler likewise denied owning any of the bags. Officer Beers then stated that the bags "must be abandoned." Neither Toler nor defendant replied. Beers then searched the black nylon bag and found two kilograms of pure cocaine inside. The three suspects were promptly arrested. Pet. App. 6a-7a; Gov't C.A. Br. 6.

2. Petitioner and Ruffin moved to suppress the cocaine. The government responded by arguing that the search of the bag was valid as a search incident to an arrest. Alternatively, the government argued that the bag had been abandoned. Following a hearing, the district court denied the motion to suppress. The court concluded that neither petitioner nor Toler had abandoned the black nylon bag, but it held that the police had probable cause to arrest them and that the search of the bag was justified as a search incident to arrest. The court found that the officers knew the following facts prior to the time they searched the nylon bag and arrested the defendants, Pet. App. 10a-11a:

> (1) the defendants were wearing digital beepers (consistent with narcotics trafficking);
>
> (2) they arrived shortly before their flight was to leave;

> (3) Ruffin paid for the tickets in cash, using aliases on two of the tickets;
>
> (4) Ruffin gave inconsistent answers when asked if she knew [petitioner] and Toler, first denying that she was with them, then admitting it;
>
> (5) when questioned, [petitioner] gave inconsistent answers, first claiming, then disclaiming ownership of the bags;
>
> (6) when asked if she was carrying narcotics or money, Ruffin produced a large sum of cash, over $15,000.00, in two or three wads of bills;
>
> (7) the defendants appeared nervous, an officer testified that Ruffin appeared petrified when she was questioned.

The court concluded that those factors, taken together, provided probable cause to arrest petitioner, Toler, and Ruffin for either conspiracy to transport narcotics or narcotics transportation. Pet. App. 11a.

3. The court of appeals affirmed. Pet. App. 1a-3a. It held, first, that the officers were justified in approaching petitioner and his companions. The court reasoned that "[t]he clothing, jewelry, beepers and nervous mannerisms of [petitioner] and his companions alerted the officers to the possibility of something amiss, and this suspicion was heightened by the fact that they paid cash for one-way tickets." Pet. App. 2a. The officers' reasonable suspicion rose to the level of probable cause, the court concluded, when petitioner and the others reacted suspiciously to their encounter with the police. The particular factors that provided the officers with probable cause, in the court of appeals' view, were the intense

nervousness of the suspects, Toler's attempt to flee, the false statements made by the suspects, and Ruffin's display of a large quantity of cash. Because the officers had probable cause to arrest the three, the court held, the nylon bag could properly be searched incident to that arrest. The fact that the search preceded the arrest, the court explained, was "irrelevant for Fourth Amendment purposes." Pet. App. 3a (citing *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 (1980)).

ARGUMENT

Petitioner contends (Pet. 8-12) that the search of the black nylon bag violated the Fourth Amendment. Because the officers had probable cause allowing them to arrest petitioner for drug trafficking at the time they conducted the search, petitioner's contention is meritless.

The officers initially approached petitioner and his party because they displayed several characteristics often associated with narcotics traffickers. The men wore pagers, as narcotics dealers often do. Ruffin purchased their tickets with cash and used names that appeared to be aliases. All three appeared nervous and seemed to be on the lookout for persons who might be watching them. Those factors gave rise to reasonable suspicion that criminal activity was afoot and justified the officers' decision to approach and briefly detain the three suspects for questioning. See *United States* v. *Sokolow*, 490 U.S. 1, 9 (1989); *United States* v. *Cortez*, 449 U.S. 411, 418-422 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968).

Once the officers approached petitioner's party, the suspects' behavior was sufficiently incriminating to give rise to probable cause. Probable cause exists when "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a person of reasonable caution [to have] the belief that an offense has been or is being committed [by the person to be arrested]." *Dunaway* v. *New York*, 442 U.S. 200, 208 n.9 (1979). The evidence known to an officer or presented to a magistrate does not have to satisfy a rigorous standard of proof in order to constitute probable cause. It is enough if the evidence gives rise to a "fair probability" that a crime has been committed or that evidence of a crime will be found in a particular place. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983); see also *id.* at 235 (probable cause "means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion") (quoting *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 348 (1813)).

Ruffin's conduct when she was approached by the officers strongly suggested criminal activity. At all times during her encounter with the police, Ruffin was extremely nervous. Initially, she lied to the officers, stating that she was not acquainted with Toler and petitioner. When the officers discovered that she had three tickets, however, she admitted that Toler and petitioner were her "partners." The inference that petitioner was engaged in some kind of illegal enterprise became even stronger when Ruffin stated that "the guy"—presumably Toler or petitioner—had

told her to purchase tickets using assumed names. Although she denied having any narcotics in her possession, Ruffin admitted carrying cash, and she displayed a large quantity of currency, another indication of drug trafficking.

Toler's actions also suggested that the trio was engaged in narcotics transportation. Toler attempted to evade the law enforcement officials when he saw them approaching his companions. Like Ruffin, he attempted to persuade the officers that he had nothing to do with the others in the group. He also lied about his travel plans. And Toler and petitioner falsely disclaimed ownership of the bags the group had been carrying, although petitioner had at first said that he owned the black nylon bag.

Together with the facts already known to the officers before they stopped petitioner and his cohorts, the actions of the three suspects during the period of their questioning provided the officers with probable cause on the basis of which they could arrest the group and search the nylon bag. As the district court correctly concluded, Pet. App. 11a:

> The possession of large amounts of cash, the denial of ownership of the bag, the denial of knowledge of the others, the use of aliases to book the tickets, the presence of beepers, along with the various other elements known to the police, all cumulate to a level at which a reasonable prudent person would conclude with a fair probability that narcotics transportation was occurring. Particularly when considered in light of the officers[']' extensive knowledge of the behavior of narcotics traffickers, there was sufficient probable cause to

> arrest [petitioner] and the other defendants at the point the search was made.

The fact that the search of petitioner's bag came before his formal arrest makes no difference to the admissibility of the cocaine under a "search incident to arrest" rationale. In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), this Court upheld the search of a suspect incident to arrest even though the actual arrest occurred subsequent to the search. This Court stated, 448 U.S. at 111:

> [T]he police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

The cases relied upon by petitioner are distinguishable. This Court in *Florida* v. *Royer*, 460 U.S. 491 (1983), held that the police who stopped a traveler in an airport did not have probable cause to arrest him. 460 U.S. at 507 (plurality opinion); *id.* at 509 (Brennan, J., concurring in the result). The plurality explained, 460 U.S. at 507:

> The facts are that a nervous young man with two American Tourister bags paid cash for an airline ticket to a "target city." These facts led to inquiry, which in turn revealed that the ticket had been bought under an assumed name. The proffered explanation did not satisfy the officers. We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an

assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.

That recitation of facts makes clear that the evidence available to the police in this case was far more substantial than the evidence available to the police in *Royer*. In this case, in addition to the factors present in *Royer*, the suspects were wearing digital beepers, they disclaimed knowing one another, they disclaimed ownership of the bags (or gave inconsistent answers with respect to their ownership of the bags), and Ruffin admitted carrying cash and showed the officers more than $15,000 in currency when she was questioned. The additional information available to the police in this case made it clear that petitioner and his cohorts were not simply "nervous young [people] paying cash for a ticket * * * under an assumed name." *Royer*, 460 U.S. at 507.

The court of appeals cases on which petitioner relies do not help him, either. In each of those cases, the evidence known to the police was far less incriminating than the evidence known to the arresting officers in this case. Thus, in *United States* v. *Wilson*, 953 F.2d 116 (4th Cir. 1991), the suspect glanced back at the officers in the airport terminal, made a false statement about where he had just come from, had a bulge in his coat, and produced only a check-cashing card in response to a request for identification—evidence that the court regarded as falling far short of justifying the suspect's seizure. In *United States* v. *Millan*, 912 F.2d 1014 (8th Cir. 1990), the court similarly found unremarkable the suspect's casual attire, his purchase of a one-way

ticket the day before the flight, his inability to remember the telephone number and address of the person he said he had been visiting, and the presence of a package of some sort in the pocket of his jacket. Those circumstances, the court concluded, would describe a very large category of presumably innocent travelers, and did not justify the suspect's seizure. 912 F.2d at 1017. The same court, in *United States* v. *White*, 890 F.2d 1413 (8th Cir. 1989), cert. denied, 111 S. Ct. 77 (1990), found the following facts insufficient to justify a seizure: the suspect's nervousness, his arrival from a "source city" for drugs early in the morning, his purchase of a one-way ticket with cash, and his firm, two-handed grip on his carry-on luggage. 890 F.2d at 1418.* In each of these cases, the evidence known to the police at the time of the seizure fell far short of the evidence known to the police in this case. There is thus no conflict among the circuits on the question presented here.

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* *United States* v. *Attardi*, 796 F.2d 257 (9th Cir. 1986), on which petitioner also relies, is entirely irrelevant. In that case, the court held that the evidence available to the agents was sufficient to justify detaining them for a dog sniff of their luggage. The court found it unnecessary to determine whether the evidence was also sufficient to constitute probable cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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